STATE OF MICHIGAN

COURT OF APPEALS

HARMONIE CLUB ENTERPRISES, LLC, DAVID SCHERVISH, and SVM DEVELOPMENT CORP

Plaintiffs/Counter-Defendants/ Appellants,

and

RANDOLPH CENTRE LTD PARTNERSHIP,

Plaintiff,

v

TCF NATL BANK,

Defendant/Counter-Plaintiff/Appellee.

UNPUBLISHED
May 24, 2007

No. 264046
Wayne Circuit Court
LC No. 04-422311-CH

Before: Zahra, P.J., and Bandstra and Owens, JJ.

PER CURIAM.

Plaintiffs appeal by right the trial court's July 1, 2005, judgment,[1] granting defendant's motion for involuntary dismissal following plaintiffs' case in chief.[2] Relevant to this appeal, the court made findings of fact, conclusions of law, and dismissed with prejudice all claims[3] by

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[1] The judgment resolved all delinquencies, disbursements and payments between Randolph Centre and defendant that were a cause of Randolph Centre's complaint. Further, the court ordered in its judgment that defendant pay Randolph Centre approximately $15,500. Defendant did not cross appeal any judgments of the court, and Randolph Centre is not a party to this appeal.

[2] Under MCR 2.504(B)(2).

[3] Under MCR 2.517

plaintiffs SVM Development Corp. ("SVM") and David Schervish ("Schervish") against defendant; found no cause of action for all claims by plaintiff Harmonie Club Enterprises ("Harmonie") against defendant; and held all plaintiffs[4] jointly and severally liable to defendant for a deficiency of $830,500. This case arises from plaintiffs' claims of breach of contract, breach of fiduciary duties, intentional interference with a contract, intentional interference with a business relationship and fraud. Plaintiffs' claims arose following Harmonie's default on a construction loan, foreclosure by advertisement and sale of the collateral property (real estate), and the resulting deficiency against the borrower and guarantors. We affirm.

I. Basic Facts and Procedure

Plaintiff Schervish is the president of Harmonie Club Development Corp., which is the managing member of defendant Harmonie. He is also president of plaintiff SVM. Additionally, Schervish testified that he is individually a limited partner of Randolph Centre Limited Partnership, and that plaintiff SVM is a general and limited partner of Randolph Centre Limited Partnership. On May 21, 1999, plaintiff Harmonie entered into a construction loan agreement with defendant's predecessor in interest, Great Lakes National Bank of Michigan. The purpose of the agreement was to finance the cost of renovating the Harmonie Club Building in Detroit.[5] The loan was secured by a mortgage on the property itself, assignment of leases and rents, assignment of contracts, and, under the agreement, "other instruments of security given to secure repayment of the Loan." Schervish and SVM agreed to be joint and several, unlimited guarantors of payment of the debt. The loan agreement was subsequently amended twice, on September 24, 1999, and on December 20, 2000.[6] Eventually, the principal of the loan grew to $2,630,000. The agreement provided for an 8 percent fixed rate of interest on the loan; however, a rate of 12 percent would be imposed upon default. Neither amendment affected the jury-trial waiver provision of the original agreement, which reads[7]:

> 10.13 **WAIVER OF JURY TRIAL.**[8] THE BORROWER AND THE LENDER ACKNOWLEDGE THAT THE RIGHT TO TRIAL BY JURY IS A CONSTITUTIONAL ONE, BUT THAT IT MAY BE WAIVED. EACH PARTY, AFTER CONSULTING (OR HAVING HAD THE OPPORTUNITY TO CONSULT) WITH COUNSEL OF THEIR [SIC] CHOICE, KNOWINGLY AND VOLUNTARILY, AND FOR THEIR MUTUAL BENEFIT, WAIVES ANY RIGHT TO TRIAL BY JURY IN THE EVENT OF LITIGATION REGARDING PERFORMANCE OR ENFORCEMENT OF, OR IN ANY WAY

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[4] SVM, Schervish, and Harmonie (referred to collectively in this opinion as "plaintiffs").

[5] Described in the mortgage as 267 and 311 E. Grand River, City of Detroit, Michigan.

[6] By the time of the second amendment, defendant had assumed control of its predecessor.

[7] As the trial court acknowledged, the End Note and Mortgage have nearly identical clauses, but substitute the words "note" or "mortgage" or "indebtedness" for "agreement" or "loan," and are otherwise identical.

[8] Emphasis original.

RELATED TO, THIS AGREEMENT OR THE LOAN.

Craig Love was defendant's loan officer in charge of the loan to plaintiffs. Love testified that as of May 8, 2002, when he completed a Special Loan Report[9] of the loan, plaintiffs were fully performing with its provisions. However, Love testified that in his next Special Loan Report, July 15, he listed the loan as being in "non-monetary" default as of May 20 because defendant had not received financial information it requested from plaintiffs. Love stated that he eventually received the requested information but did not remove the default status from the loan because he believed plaintiff Harmonie was not complying with a debt service coverage ratio[10] of 1.2 to 1 he believed was required by the loan agreement. He stated Harmonie's ratio was at 1.07 to 1. Love also testified that, even though he declared the loan in default, no acceleration or foreclosure proceedings were immediately initiated. Love's successor, Joseph Vassallo, testified that defendant received approximately $58,000 more in interest from the time the default interest rate was imposed until the time it was removed in December, 2002.[11] In late 2002, the parties began discussing the possibility defendant would make a loan to plaintiff Schervish's other business, Randolph Centre, against that business' equity. The purpose of the second loan was to shore up the (first) loan to plaintiff Harmonie and provide cash for improvements to Randolph Centre. In April, 2003, defendant and Randolph Centre entered into a loan agreement in which defendant agreed to lend Randolph Centre $1.34 million.[12] Accompanying the agreement was a Disbursement Agreement, which set forth various amounts to be disbursed to different entities.

In December, 2003, defendant moved the original Harmonie loan from its commercial loan department to its loan workout department because the reserve established by the (second) loan to Randolph Centre was diminishing more quickly than anticipated, and no new tenants had been found for the Harmonie building. In March, 2004, the Randolph Centre Disbursement Agreement was amended to disburse the remaining balance of $77,150.73. Approximately $50,267 went to defendant to make the January and February, 2004, payments on the (first) Harmonie loan. The March, 2004, disbursements exhausted the proceeds of the (second) Randolph Centre loan.

Defendant Harmonie failed to make its loan payments in March, April, and May of 2004,

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[9] The report states, among other things, that plaintiff Harmonie's primary lessee, the Detroit Lions, intend to move by year's end and that the only other tenant at the time, Center Street Pub, would not pay enough in rent to service the loan.

[10] The debt service coverage ratio is based on current debt service and current net operating income to measure risk. It is expressed as Net Operating Income (NOI) / Annual Debt Service; e.g., $1 million NOI / $800,000 debt service = 1.25 to 1. Having a 1 to 1 ratio would mean that income is minimally sufficient to meet debt service. Institutional lenders typically use debt service coverage ratio. Appraisal Institution, The Appraisal of Real Estate (11th ed), p 519-520; p 650-651.

[11] The trial court eventually found that the agreement did not require plaintiffs to maintain a particular debt service coverage ratio.

[12] Schervish acted as a guarantor of this loan, too.

even though plaintiff Schervish had moved plaintiff SVM into the building as a tenant. On May 18, via letter to plaintiffs, defendant gave notice of default on the (first) loan to plaintiff Harmonie and that it would likely foreclose.[13] The trial court denied plaintiffs' motion to enjoin the subsequent sale, stating that plaintiffs' allegations suggested a complaint could be made for damages and that plaintiffs could also seek relief by redeeming after the foreclosure sale and prior to the expiration of the redemption period.

Prior to sale, defendant had the building appraised by R. E. Hanton & Associates ("Hanton"). The July 19, 2004, appraisal estimated the net realizable value of the property, if vacant,[14] to be approximately $2,040,000. Terzo & Bologna, Inc., reviewed the appraisal. The review discovered several inaccuracies but otherwise concluded that the estimated value was reasonable, concluding that the net realizable value was between $1.97 million and $2.15 million. Defendant was the sole bidder at the foreclosure sale on August 4, 2004, bidding $2 million. At the time of the foreclosure, the outstanding balance on the (first) loan was approximately $2.5 million. After the sale, plaintiff Schervish sought from NCS Commercial Funding LLC of Atlanta, Georgia, ("NCS") another loan to redeem the property. An appraisal for NCS, by Frohm & Widmer, also of Atlanta,[15] determined three values for the property: (1) A "stabilized" value of $3 million; (2) an "as is leased fee market value" of $2.75 million; and (3) an "as is leased fee disposition value" of $2 million. The trial court found that the $2.75 million estimate, upon which plaintiffs rely in their appeal, was only true if the property had eight prospective tenants paying rent, which it did not as of the valuation date, January 4, 2005.[16]

Plaintiffs sued for declaratory relief, breach of contract, breach of fiduciary duties, intentional interference with a contract, intentional interference with a business relationship, misrepresentation,[17] and injunctive relief.

At the hearing on defendant's motion to strike plaintiffs' jury demand, plaintiffs argued that defendant tortiously interfered with the related loan made by defendant to Randolph Centre. Such tortious interference, plaintiff argued, was akin to a bank employee punching plaintiff Schervish in the nose, or plaintiff Schervish slipping and falling in the bank after having made a payment on the note. The court granted defendant's motion to strike, citing *Ayar & Vincent v Foodland Distributors*, unpublished opinion per curiam of the Court of Appeals, issued November 11, 2000 (Docket No. 214293).[18] The court determined that the jury waiver language

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[13] Foreclosure was made by advertisement, despite plaintiffs' assertion during argument before this Court that a judicial foreclosure occurred.

[14] Defendant predicted that the two tenants, including SVM, would not pay rent to defendant and would be difficult to remove.

[15] The appraisers state in their report that they are certified with the State of Michigan.

[16] The Frohm & Widmer appraisal of $2.75 million is based on several prospective tenants paying rent starting March 1, 2005, but the prospective tenants did not materialize.

[17] Count VI of the complaint lists "misrepresentation, fraud, deceit" together.

[18] The trial court incorrectly cited the case as *Ayar v Joilet*, "Court of Appeals Docket No.
(continued…)

in the contract in *Ayar* was similar to the language of the provision here and was therefore persuasive. The court stated:

> The Court of Appeals (in *Ayar*) said the contractual language used is so broad it contemplates applying the jury waiver provisions to contract and tort claims that are related to the sublease in any manner.
>
> Although I concede the language in *Ayar* is even broader than the language here, I think the language "in any way related to" is also very broad language and includes tort claims that relate to these. And it appears to me hearing what the tort claim is about, this tortious interference claim, that it would be subject to the jury waiver provision. I'll grant the motion to strike the jury demand.

The trial court issued its judgment July 1, 2005, dismissing with prejudice all claims by plaintiffs SVM and Schervish against defendant. The judgment also found no cause of action for all claims by plaintiff Harmonie against defendant; and held all plaintiffs jointly and severally liable to defendant for a deficiency of $830,500. The judgment also found against defendant in favor of Randolph Centre for an amount of $15,516.50. This appeal followed.

II. Analysis

On appeal, plaintiffs claim the trial court erred by determining that the loan agreement precluded a jury trial for tort claims by the borrower against the lender; abused its discretion by not setting aside the foreclosure; and erred by holding that defendant bid a fair price for the real estate. We disagree.

A. The Contract Precluded a Jury Trial

Questions involving the proper interpretation of a contract or the legal effect of a contractual clause are reviewed de novo. *Archambo v Lawyers Title Ins. Corp*, 466 Mich 402, 408; 646 NW2d 170 (2002). Further, "In ascertaining the meaning of a contract, we give the words used in the contract their plain and ordinary meaning that would be apparent to a reader of the instrument." *Rory v. Continental Ins. Co.*, 473 Mich 457, 464; 703 NW2d 23 (2005). Unambiguous contracts are not subject to judicial construction, but must be enforced as written. Agreements voluntarily and fairly made are valid and enforceable. *Id* at 468.

Michigan guarantees a plaintiff's right to a jury trial in a civil action. *Zdrojewski v Murphy*, 254 Mich App 50, 75; 657 NW2d 721 (2002); however, the right is permissive, not absolute, and therefore may be waived. *McKinstry v Valley Obstetrics-Gynecology Clinic, PC*, 428 Mich 167, 183; 405 NW2d 88 (1987). A waiver is the intentional relinquishment of a known right. *Roberts v Mecosta Co Hosp*, 466 Mich 57, 64 n 4; 642 NW2d 663 (2002).

On appeal, plaintiffs appear to claim that the waiver was inapplicable to its complaint for two reasons: (1) The parties did not contemplate at the time the contract was made that either

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(…continued)

214263, released November 21, 2000."

would engage in a tort against the other, and therefore did not intend that the jury-trial waiver would be effective against tort claims. (2) Torts are beyond the scope of the waiver because they are not "related to" either party's performance in the underlying agreement. With regard to plaintiffs' first point, there is nothing in the record – and plaintiffs did not direct the trial court to any evidence or this Court to anything on appeal – to show that the parties' intent is anything other than what is expressed in the contract. Parol evidence is admissible to determine the meaning given by parties to specific terms of a contract, *Klapp v United Ins. Group Agency, Inc* 468 Mich 459, 470; 663 NW2d 447; however, such evidence is only admissible if the terms are "vague, uncertain, obscure, or ambiguous, and where the words of the contract must be applied to facts ascertainable only by extrinsic evidence." *Id.* Plaintiffs do not make an argument on appeal that the terms of the provision at issue are vague or otherwise nebulous. Moreover, the jury-trial waiver in the agreement is the only provision printed in all capital letters, and a nearly identical provision is included in the mortgage and endnote documents. To successfully assert their argument, plaintiffs needed to show first that the contested language was vague and then provide extrinsic evidence that supports their assertion. Plaintiffs did neither; therefore, their first argument with regard to this issue fails.

Plaintiffs' second point challenges the determination of the trial court, which relied on *Ayar*, *supra*, that the alleged tortious interference, inter alia, is not "related to" the agreement. When construing the terms of a contract, the plain language applies. *Rory*, *supra*. In this case, we agree that plaintiffs' argument is somewhat valid with regard to the words "performance or enforcement" because those words suggest specific actions taken by either party to a loan agreement, i.e., enforcement of rights and performance of duties are the nature of contracts. See *Wilkie v Auto-Owners Ins. Co.*, 469 Mich 41, 62; 664 NW2d 776 (2003). In striking the jury demand, though, the trial court expressly relied on the loan agreement's much broader "or in any way related to" clause. The court's reasoning is analogous to this Court's determination as to the silent fraud tort claim in *Ayar*, *supra*. In that case, this Court stated: "[T]he contractual language (the parties) used is so broad it contemplates applying the jury waiver provision to contract and tort claims that are *related to the sublease in any manner*." [Emphasis added.] Similarly, here, even though the language of the provision at issue reaches far, the trial court noted that the language of the jury-trial waiver provision in *Ayar* was broader yet still effective; therefore, tort claims could arise that were "related to" the loan agreement. Moreover, Michigan recognizes the principle that competent parties are free to contract for whatever terms they wish, without fear of impairment or judicial interference. *Wilkie*, *supra*, at 62-63. Plaintiffs do not assert that they were incompetent. Most significantly, plaintiffs based their tort claims on their belief that defendant intentionally overcharged interest when it put the first loan in non-monetary default and intended to cause Harmonie's failure by not timely disbursing proceeds from the second loan. Both theories arise directly from, and are therefore "related to," the loan agreements between the parties. While we agree with the the trial court's analogy to *Ayar*, we also conclude that the alleged tortious activity was related to the underlying agreement. Therefore, plaintiffs' second argument as to this issue fails as well.

B. The Foreclosure and Sale

A foreclosure by advertisement is controlled by statute and is not a judicial action; rather, it is based on the contract between the parties to the mortgage. *Cheff v Edwards*, 203 Mich App 557, 560; 513 NW2d 439 (1994). MCL 600.3201 *et seq.* While foreclosure by advertisement is

expeditious and normally outside judicial review, determination of a deficiency invites judicial inquiry into the "adequacy of the bid price." *Gruskin v Fisher*, 405 Mich 51, 63 n 6; 273 NW2d 893 (1979). In this case, the trial court determined that a deficiency occurred; therefore, judicial inquiry into the adequacy of the bid price is proper. Further, the trial court found as a matter of fact that the value of the mortgaged property was approximately $2 million, based upon the appraisals by Hanton and the review by Terzo. This Court reviews for clear error findings by a trial court sitting without a jury. *Walters v Snyder*, 239 Mich App 453, 456; 608 NW2d 97 (2000).

1. Adequacy of the Bid Price

Plaintiffs argue that the trial court erred in accepting the Hanton/Terzo appraisal of the property because that appraisal reduced the estimated value of the property by an amount equal to what the winning bidder would have to pay to sell it. To support their assertion, plaintiffs rely on *Chabut v Chabut*, 66 Mich App 440 (1976). In *Chabut*, the mortgagee bank bid an amount at the foreclosure sale that was substantially less than what the trial court determined was the fair market value of the property. The central issue in that case was whether sureties on the debt were entitled to redeem their pledge of stock before the bank used it to satisfy the obligation. The Court determined that the sureties were entitled to reimbursement of the stock because no deficiency existed. *Id* at 454-455. As such, plaintiffs' reliance on *Chabot*, besides being immediately distinguishable from the case here, simply restates the claim that the trial court in this case erred in valuing the property. Plaintiffs still must show, under *Walters*, *supra*, how the trial court's determination of the value of the property was clearly erroneous.

Plaintiffs also attempt to rely on *Bank of Three Oaks v Lakefront Properties*, 178 Mich App 551 (1989). In *Bank of Three Oaks*, the mortgagee bank sued defendant guarantors for post-foreclosure sale interest, taxes and other costs. This Court determined that the mortgage was extinguished[19] when the bank purchased the collateral property for a price equal to what it was owed, creating no deficiency. At that point, the guarantors were relieved of any post-foreclosure obligations.

Michigan law sets forth the calculation for a deficiency awarded by the circuit court. MCL 600.3150 reads:

> In the original judgment in foreclosure cases the court shall determine and adjudge which defendants, if any, are personally liable on the land contract or for the mortgage debt. The judgment shall provide that upon the confirmation of the report of sale that if either the principal, interest, or costs ordered to be paid, is left unpaid after applying the amount received upon the sale of the premises, the clerk of the court shall issue execution for the amount of the deficiency, upon the application of the attorney for the plaintiff, without notice to the defendant or his attorney. The court may order and compel the delivery of the possession of the premises to the purchaser at the sale.

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[19] Citing *Guardian Depositors Corp v Hebb*, 290 Mich 427, 432; 287 NW 796 (1939).

In this case, the trial court did not award damages for events after the mortgage was extinguished, as was the issue in *Bank of Three Oaks*.

Plaintiffs next claim that the deficiency judgment against them is barred by statute. They cite MCL 600.3280, which reads, in pertinent part:

> When, in the foreclosure of a mortgage by advertisement, any sale of real property has been made after February 11, 1933, or shall be hereafter made by a mortgagee, trustee, or other person authorized to make the same pursuant to the power of sale contained therein, at which the mortgagee, payee or other holder of the obligation thereby secured has become or becomes the purchaser, or takes or has taken title thereto at such sale either directly or indirectly, and thereafter such mortgagee, payee or other holder of the secured obligation, as aforesaid, shall sue for and undertake to recover a deficiency judgment against the mortgagor, trustor or other maker of any such obligation, or any other person liable thereon, *it shall be competent and lawful for the defendant against whom such deficiency judgment is sought to allege and show as matter of defense and set-off to the extent only of the amount of the plaintiff's claim, that the property sold was fairly worth the amount of the debt secured by it at the time and place of sale or that the amount bid was substantially less than its true value, and such showing shall constitute a defense to such action and shall defeat the deficiency judgment against him, either in whole or in part to such extent*. [Emphasis added.]

In this case, defendants sought a deficiency judgment against plaintiffs. The trial court determined that the deficiency was $888,500, which it offset by $58,000 for the amount of interest erroneously charged by defendants, leaving a final award of $830,500. As a result, the statute applies to the judgment in this case.

Plaintiffs claim the statute bars deficiency judgments when a debtor can make any showing the collateral property was sold for less than its fair market value. Our Supreme Court analyzed the predecessor statute (1940 CL 14444-21), in *Bankers Trust Co v Rose*, 322 Mich 256; 33 NW2d 783 (1948). The facts of that case are similar to those here; even though the debtors redeemed after foreclosure, they still owed for a deficiency. The defendants in *Bankers Trust* asserted the statute as a defense to plaintiff mortgagee's ability to recover the deficiency. The Court determined that the mortgagee was entitled to recover the deficiency despite the fact that "testimony upon the trial before the circuit judge would justify a finding that the premises were worth much more than $27,500, the amount due at the date of the foreclosure sale." *Id* at 260. Further, the Court, citing *Guardian Depositors Corp v Powers*, 296 Mich 553; 296 NW 675 (1941), stated:

> It is fairly to be implied that one has a vested substantive right to what is his due. But defendants (borrowers) would have us so to construe the act in question as to take from plaintiff what is plaintiff's due, that is, the full payment of the debt. We cannot assume that the legislature intended any such result.
>
> The statute nowhere required plaintiff to bid the full amount of the debt due as a condition of bidding at the foreclosure proceedings. Plaintiff cannot be said to have waived the payment of the remainder of the debt.

In this case, the trial court heard evidence in the form of the NCS valuation that the property in question was worth more than the price paid at the foreclosure sale, much like the trial court in *Bankers Trust, supra*. If plaintiffs' interpretation of the statute were correct, then, as the *Bankers Trust* Court pointed out, a mortgagee would be forced to bid at the highest estimate to avoid being barred from recovering a deficiency. Further, the Court in *Guardian Depositors Corp v Powers, supra,* determined that the statute was intended to bar a mortgagee from recovering a windfall, which windfall would be created by the mortgagee buying the property after a foreclosure by advertisement (as distinguished from a judicial foreclosure, to which common law would apply) at a price far below its fair market value. *Id* at 563. Moreover, we determine that the operative language of the statute, "to allege and show," means that, in order to defeat the deficiency judgment, a plaintiff would have to plead and prove to a trier of fact that the price received for the property sold was fairly worth the amount of debt owed. Without such a "showing," i.e., finding of fact, the defense is inoperable. Our analysis is consistent with our Supreme Court's determination that the statute suffices merely to permit judicial inquiry into the "adequacy of the bid price" in a foreclosure by advertisement that results in a deficiency judgment, as occurred in this case. *Gruskin, supra*. It is also consistent with the *Banker Trust* decision where a mortgagor must plead and prove to the trier of fact that the sale amount was less than the fair market value. For the foregoing reasons, plaintiffs' claim that the deficiency is barred by statute must fail; further, for the reasons stated, plaintiffs have failed to show that the trial court clearly erred in determining the fair market value of the property.

2. Foreclosure

Plaintiffs next claim that the court abused its discretion by not setting aside the foreclosure and that the court ignored evidence of defendant's breach of contract[20] and alleged unethical conduct. Specifically, plaintiffs allege that no payment on the first loan amount was due or owed to defendant at the time of the foreclosure and that no default had occurred.

As our Supreme Court in *Gruskin, supra*, determined, foreclosure by advertisement is intended to be expeditious and not use judicial resources for their prosecution. Under MCL 600.3201 *et seq*, mortgagees must follow certain procedures to foreclose on a collateral property. The sole remedy to relieve the foreclosure is redemption, and mortgagors are given a redemption period during which they can pay an amount equal to the winning bid at the foreclosure sale and take equitable title to the property. *Senters v Ottawa Savings Bank*, 443 Mich 45, 50; 503 NW2d 639 (1993). MCL 600.3240. In this case, the statute allows plaintiffs a 6-month redemption period from the date of the foreclosure sale. Plaintiffs did not redeem, and title vested in defendant. Our Supreme Court has used its equitable powers to effectuate a longer redemption period, but only in "unusual" cases where a fraud occurred and was demonstrated by clear and

[20] In an April, 29, 2005 ruling from the bench, the trial court granted plaintiff Harmonie's partial motion for summary disposition regarding the issue of defendant's tortious interference with plaintiffs' Randolph Centre building lease. The court determined that defendant wrongfully withheld a disbursement from the second loan, causing a landlord/tenant dispute, which resulted in a separate action between a tenant in that building and plaintiff Harmonie. However, the court's judgment regarding this issue is not on appeal before this Court.

convincing evidence. *Flynn v Korneffel*, 451 Mich 186, 199; 547 NW2d 249 (1996); however, courts cannot enlarge or abridge the right to redeem because it is statutory. *Wood v Button*, 205 Mich 692, 703; 172 NW 422 (1919). Here, plaintiffs cannot mount on appeal a collateral attack for their own failure to use the remedy available under the statute. To the extent that defendant's error in charging a default interest rate was "ignored" by the trial court resulting in an abuse of discretion, it is clear from the record – particularly the court's finding of fact on the record supporting the judgment against defendant – that the trial court did not ignore defendant's error; undeniably, the trial court in its final judgment credited to plaintiffs the amount defendant overcharged, $58,000. Moreover, this fact is not at issue because defendant does not cross-appeal any finding or determination by the court. With regard to plaintiffs' closely related assertion that the trial court erred in finding a default, plaintiffs point to nothing specific in the evidence that plaintiffs were not in default, as the trial court concluded. Moreover, plaintiffs' reference in their appellate brief to the non-monetary default caused (erroneously) by defendant's belief that a certain debt ratio was to be maintained[21] is not the default that formed the basis of the foreclosure; rather, the default that caused acceleration of the debt and the foreclosure was based upon plaintiffs' uncontested failure to make their March, April and May, 2004, payments. Therefore, we conclude that the use of equitable powers by this Court or the trial court to enlarge the statutory redemption period is inappropriate.

Affirmed.

/s/ Brian K. Zahra
/s/ Richard A. Bandstra
/s/ Donald S. Owens

[21] Plaintiffs' brief on appeal alludes to Schervish's testimony on direct exam; however, defendant stated to the trial court: "[W]e've conceded that . . . the imposition of the debt service coverage ratio rate of default from August 5 on was inappropriate . . .."